



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 10, 2004

Ms. Pamela Hutson
Assistant City Attorney
City of Arlington
P.O. Box 90231
Arlington, Texas 76004

OR2004-10504

Dear Ms. Hutson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 213508.

The City of Arlington (the "city") received a request for a named officer's 1) personnel file, including all disciplinary actions and reprimands; 2) Internal Affairs file; and 3) initial interview, oral review board, initial employment application, and background investigative documents. You state that you have no documents responsive to the requests for disciplinary actions and reprimands and the Internal Affairs file.¹ You claim that the remaining responsive information is excepted from disclosure under section 552. 103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.²

¹We note that the Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received. *Economics Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we address the department's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Further, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the document. You state the city received the request for information on September 4, 2004. However, the city did not request a decision from this office until September 21, 2004. Additionally, the city did not timely submit to this office the specific information requested or a representative sample of the information. Consequently, the city failed to request a decision within the ten-business-day period mandated by section 552.301(b) of the Government Code and failed to timely submit the requisite information as required by section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to timely seek an open records ruling or submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You have submitted to this office arguments regarding your section 552.103 claim from Ms. Shannon Prellwitz, Assistant District Attorney, Tarrant County District Attorney's Office (the "D.A."). Ms. Prellwitz informs this office that the requested information relates to a pending criminal trial being prosecuted by the D.A., and requests that it be withheld.

The need of a governmental body, other than the body that has failed to timely comply with the Act's procedures, may, in appropriate circumstances, be a compelling reason for non-disclosure. *See Open Records Decision No. 586 (1991)*. In this instance, we find that the D.A.'s assertion of its interest in having the requested information withheld constitutes a compelling demonstration, sufficient to overcome the heightened presumption of openness, that the requested information may be withheld under section 552.103 of the Act. *See id.*, *see also Open Records Decision Nos. 469 (1987)* (university may withhold information under section 552.103 predecessor to protect district attorney's interest in anticipated criminal litigation); 121 (1976) (same).

We now address the applicability of section 552.103 of the Government Code to the submitted information. A governmental body raising section 552.103 has the burden of providing relevant facts and documents sufficient to establish that (1) the governmental body is a party to litigation that was pending or reasonably anticipated on the date of receipt of the request for information *and* (2) the information at issue is related to that litigation. See *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); see also Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

You represent to this office that the requested information relates to a pending criminal prosecution. You indicate that the prosecution was pending when the city received this request for information. You do not inform us, however, that the city is a party to the pending criminal litigation. See Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). In such a situation, we require an affirmative representation from the prosecuting attorney that he or she wants the submitted information withheld from disclosure under section 552.103.

As noted, you have submitted a letter from an Assistant District Attorney for Tarrant County stating that her office is prosecuting the pending case. The prosecutor states that

“[t]he information requested is related to the litigation because the personnel records of the police officer could be used for impeachment purposes. As a result, release of these records outside of the criminal court discovery process could be detrimental to the state and its interests in the litigation.”

The prosecutor asks that the requested information be withheld from disclosure. We find that you have established that criminal litigation was pending when the department received this request for information. We also find that the submitted information relates to the pending criminal litigation. Therefore, based on your representations, the prosecutor's letter, and our review of the information at issue, we conclude that the submitted information is excepted from disclosure at this time under section 552.103 of the Government Code.

In reaching this conclusion under section 552.103, we assume that the opposing party to the criminal case has not seen or had access to the marked information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. See Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that relates to the pending litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982).

Furthermore, the applicability of section 552.103 ends once the related litigation concludes. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

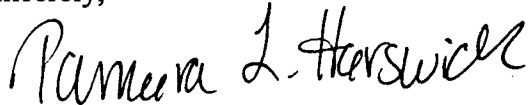
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Tamara L. Harswick". The signature is written in dark ink and is positioned above the typed name.

Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 213508

Enc. Submitted documents

c: Mr. Chris Turnbow
The Coffrey Firm
4700 Airport Freeway, Suite B
Fort Worth, Texas 76117
(w/o enclosures)